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DELEGATION OF POWER TO BOARDS AND COMMISSIONS.

The part played by boards and commissions in the administration of our laws is becoming increasingly important. The great social and industrial evolution of the past century, the marvelous discoveries and inventions by which the forces of nature have been adapted to our needs and conveniences, the necessity of regulating and curbing the power of organized capital and of the labor unions and settling industrial controversies, the modern demand for more adequate laws and regulations in matters vital to the public welfare, such as education, sanitation and housing, and the many other demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of administrative bodies and the delegation to them of discretionary powers in relation to matters of detail essential to give effect to the legislative will. The question, therefore, of what powers the legislature may delegate to a board or commission is one of great interest and importance.

It is a well established doctrine that the functions of the legislature must be exercised by it alone and cannot be delegated.¹

Judge Cooley says in an oft-quoted passage: "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign

1. *Field v. Clark*, 143 U. S. 649, 12 S. Ct. Rep. 495, 36 L. Ed. 844; *Peoples Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. 38, 19 L. Ed. 844; *Boston v. Chelsea*, 212 Mass. 127, 98 N. E. 620; *Myeth v. Cambridge*, 200 Mass. 474, 86 N. E. 925, 128 Am. St. R. 439, 23 L. R. A. (N. S.) 147; *Senate Happy Home Clubs v. Alpena County*, 99 Mich. 117, 57 N. W. 1101, 23 L. R. A. 144; *Atlantic Express Co. v. Wilmington, etc., R. Co.*, 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393; *Dowling v. Lancashire Ins. Co. (Wis.)*, 65 N. W. 738.

power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.”³

But any power not legislative in character which the legislature may exercise it may delegate,⁴ and before a court can properly hold that a statute is void as unconstitutionally delegating legislative power, it must clearly appear that the power in question is purely legislative.⁵

The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.⁶

Therefore the legislature may delegate to commissions and

3. *Cooley's Const. Lim.* (6th Ed.) 137. See also, *People v. Klink Packing Co.* (N. Y.), 108 N. E. 278, 283; *Cincinnati, etc., R. Co. v. Comm'rs Clinton Co.*, 1 Ohio St. 77, 87; *Anderson v. Manchester Fire Assurance Co.* (Minn.), 63 N. W. 241; *State v. Young*, 29 Minn. 551, 9 N. W. 737; *Bailey v. Van Pelt* (Fla.), 82 So. 789; *Merchants' Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565, 572.

“Legislative power cannot be delegated to a commission.” *Interstate Com. Comm. v. Goodrich Transit Co.*, 224 U. S. 194, 214, 56 L. Ed. 729, 32 Sup. Ct. R. 436; *Peterson v. Lewis* (Or.), 154 Pac. 101, 106; *Sutherland on Stat. Const.* (2nd ed.) sec. 93; *State v. Orange*, 60 N. J. Law, 111, 36 Atl. 707.

4. *Minneapolis, etc., R. Co. v. Wisconsin R. Comm.*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821; *Parke v. Bradley*, 86 So. 28, 31, citing 12 Corp. Jur. 840.

5. *Parke v. Bradley* (Ala.), 86 So. 28, 31, citing 12 Corp. Jur. 840; *State v. Public Service Commission* (Wash.), 162 Pac. 523, 525; *Bailey v. Van Pelt* (Fla.), 82 So. 789.

6. *Cincinnati, etc., R. Co. v. Comm'rs Clinton Co.*, 1 Ohio St. 77, 88; *Field v. Clark*, 143 U. S. 649, 693, 36 L. Ed. 294.

boards administrative functions in carrying out the purposes of a statute.⁷

It may delegate to them various governmental powers for the more efficient administration of the laws, subject always to the clearly implied limitation of the constitution that the lawmaking power, invested exclusively in the legislature, cannot be delegated.⁸

"The legislature can delegate the power to determine the facts or state of things upon which the law makes its own operation depend."⁹

In a Pennsylvania case, frequently quoted, it is said: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation."¹⁰

"Where an act is clothed with all the forms of law, and is complete in and of itself, it may be provided that it shall become operative only upon some certain act or event, or, in like manner, that its operation shall be suspended; and the fact of such act or event, in either case, may be made to depend upon the ascertainment of it by some other department, body, or officer, which is essentially an administrative act."¹¹

"Half the statutes on our books are in the alternative, depend-

7. *State v. State Securities Commission* (Minn.), 176 N. W. 759, 760.

8. *Parke v. Bradley* (Ala.), 86 So. 28, 29, citing *R. R. Commission v. Ala. North. Ry. Co.*, 182 Ala. 357, 62 South. 749; *Fox v. McDonald*, 101 Ala. 51, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98, 12 Corp. Jur. 839, sec. 323.

9. *State v. Public Service Commission* (Wash.), 162 Pac. 523, 525; *Merchants' Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565.

10. *Locke's Appeal*, 72 Pa. St. 491, 498, quoted in *Field v. Clark*, 143 U. S. 649, 694, 36 L. Ed. 294; *Bailey v. Van Pelt* (Fla.), 82 So. 789, and *Dowling v. Lancashire Ins. Co.* (Wis.), 65 N. W. 738, 739. See also, *Welch v. Swasey*, 214 U. S. 91, 53 L. Ed. 923, 29 Sup. Ct. 567; *Eubank v. Richmond*, 110 Va. 749, 753, 67 S. E. 376.

11. *Dowling v. Lancashire Ins. Co.* (Wis.), 65 N. W. 738, 739

ing on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." ¹²

"The congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the congress." ¹³

The legislature may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. ¹⁴

This principle of the law is peculiarly applicable to regulations under the police power, since the complex and ever-changing conditions that attend and affect such matters make it impracticable for the legislature to prescribe all necessary rules and regulations. ¹⁵

"The authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense." ¹⁶

The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed, is apparent and strikingly great, and this we understand

12. *Moers v. City of Reading*, 21 Pa. St. 188, 202, quoted in *Field v. Clark*, 143 U. S. 649, 694, 36 L. Ed. 294.

13. *Interstate Com. Comm. v. Goodrich Transit Co.*, 224 U. S. 194, 214, 56 L. Ed. 729, 32 Sup. Ct. R. 436; *Roebuck & Co. v. Federal Trade Commission* (Cir. Ct. App.), 258 Fed. 307, 312.

14. *Bailey v. Van Pelt* (Fla.), 82 So. 789.

15. *Bailey v. Pelt* (Fla.), 82 So. 789.

16. *Bailey v. Van Pelt* (Fla.), 82 So. 789, 794; *United States v. Grimaud*, 220 U. S. 506, text, 521, 31 Sup. Ct. 480, 55 L. Ed. 563. See also, *Parke v. Bradley* (Ala.), 86 So. 28, 31; *Fox v. McDonald*, 101 Ala. 51, 69, 70, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98; 12 R. C. L. 1265, sec. 3, and cases cited; 12 Corp. Jur. 847, sec. 330.

to be the distinction recognized by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional, whilst the latter would not.¹⁷

The legislature can delegate to boards the power to establish and promulgate and enforce rules and regulations with reference to matters in which the public welfare is concerned such as infectious diseases, public roads, etc. But the crime punished is by virtue of the statute which authorizes punishment after conviction on a charge alleging the violation of these rules and regulations after adoption in accordance with the act of the legislature.¹⁸

The legislature may constitutionally confer on a commission judicial powers as a mediatory tribunal,¹⁹ and it is within the power of the legislature, when enacting a statute creating a new right with its remedy, to vest in some board or person power to adjudicate all matters arising under the statute, and to make such adjudication final and conclusive.²⁰

But "the power to bind and loose, to inaugurate or suspend the operation of the law, to say when and where it is law, is, of necessity, an inherent and integral part of the law-making power, not to be delegated to and wielded by any commission."²¹

And the legislature cannot, without prescribing any standard of exemption, leave it wholly to the discretion of a commission to exempt persons from the operation of a statute.²²

Nor can an administrative body assume the legislative function and confer upon itself the power to make a law giving to itself judicial functions, even as incidental to its administrative powers.²³

17. *Georgia R. R. v. Smith*, 70 Ga. 694, 699; *Bailey v. Van Pelt* (Fla.), 82 So. 789.

18. *Horn v. State* (Ala.), 84 So. 883, 884.

19. *State v. Public Service Commission* (Wash.), 162 Pac. 523, 525.

20. *State v. Board of Trustees* (Wash.), 161 Pac. 361, 262; *State v. Board of Trustees, etc.*, 117 La. 1071, 42 So. 506, 8 Ann. Cas. 945.

21. *Merchants' Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565, 571.

22. *People v. Klinck Packing Co.*, 214 N. Y. 121, 108 N. E. 278, affirming 164 App. Div. 97, 149 N. Y. Supp. 504.

23. *State v. Public Service Commission* (Wash.), 162 Pac. 523, 527.

These are the general rules for determining whether a particular power delegated to a board or commission is constitutional, and the following digest of the latest decisions applying and illustrating these rules may be of some interest to the profession.

Commissioner of Agriculture.—Power vested in a state commissioner of agriculture to waive a provision of a statute requiring the giving of a bond conditioned to pay debts in order to secure a license to purchase milk and cream in case of persons of recognized financial ability is not an unconstitutional delegation of legislative power. Pound, J., delivering the opinion of the court, said: "Nor can it be said that the power vested in the commissioner of agriculture to waive the requirement of a bond or other security in certain cases is a delegation of legislative power. He is not left 'without check or guidance.' The legislature has furnished the rule; the commissioner merely applies it. His determination is subject to judicial review. In *People v. C. Klinck Packing Co.* (214 N. Y. 121, 139, 108 N. E. 278, Ann. Cas. 1916D, 1051), the provisions of the statute exempted from the application of the hours of Rest Law certain employees, 'if the commissioner of labor in his discretion approved.' Those words were held to have the vice of vesting the commissioner with the power wholly at his volition to suspend the operation of the statute. The legislature here prescribes the regulations which are to be enforced according to the legal discretion of the commissioner. *Brazee v. Michigan*, 241 U. S. 340, 343, 60 L. Ed. 1034, 1036, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917C, 522." ²⁴

Board of Education.—The power to legislate cannot be delegated to boards of education, but when the legislative policy is determined by the competent legislative authority ample administrative powers may be vested in such boards to the end that the legislative rule may be properly enforced.²⁵

²⁴. *People v. Beakes Dairy Co.*, 222 N. Y. 416, 119 N. E. 115, 3 A. L. R. 1260, 1269.

²⁵. *Rhea v. Board of Education* (N. D.), 171 N. W. 103, 105.

Board of Health.—Legislative power cannot be delegated to a board of health.²⁶

Powers granted to local boards of health to determine the fact whether an emergency exists for the making of rules and regulations and the adoption of health measures is administrative and not legislative.²⁷

Chapter 205 of the Kansas Laws of 1917 which undertakes to protect public health by preventing dissemination of dangerous communicable diseases, through isolation and quarantine measures, non-observance of which is declared to be a misdemeanor, is not unconstitutional, on the ground it delegates legislative power, because it confers on the state board of health authority to designate such diseases as are infectious, contagious, or communicable in their nature, and to prescribe proper control measures.²⁸

Board of Dental Examiners.—It is competent for the legislature to declare for what acts or conduct a license to practice dentistry may be revoked, and to vest in state boards the authority to investigate and try the charges which may be made under such a statute; but the statute should specifically name or designate the offenses or wrongful acts which shall constitute a cause for revoking his license, so that the dentist may know in advance whether he had violated the terms of the statute.²⁹

Industrial Commission.—A statute prohibiting employment of minors or females in dangerous and unhealthy occupations may delegate to the Industrial Commission the power to determine which occupations and places of employment are dangerous or unhealthy.³⁰

Public Utilities Commission.—"The state has inherent power

26. *Globe School Dist. No. 1 v. Board of Health* (Ariz.), 179 Pac. 55; *Rhea v. Board of Education, etc.* (N. Dak.), 171 N. W. 103, 105.

27. *Globe School Dist. No. 1 v. Board of Health* (Ariz.), 179 Pac. 55, 60.

28. *Ex Parte McGee* (Kan.), 185 Pac. 14.

29. *Green v. Blanchard* (Ark.), 211 S. W. 375, 5 A. L. R. 84, 89.

30. *Squires v. Brown* (Wis.), 174 N. W. 548.

to regulate and control public utilities within the state, and, to this end, it is well settled the legislature may create a commission to which it may delegate governmental authority and supervision, and that the right to do so exists without any constitutional provision; that is, the power of the legislature to regulate the service of public utilities may be exercised through a commission, although the constitution is silent on the subject. The powers of the commission in such cases are administrative. Its duties are to administer the law and carry into effect the will of the legislature.”³¹

The power to ascertain from the facts whether a railroad company should discontinue service upon and dismantle the road may be delegated by the legislature to a commission. “The commission acts upon the existence of facts which it must determine, but this is not the exercise of judicial power in a constitutional sense. In administering the law in such a case the commission must necessarily determine many things and facts. This involves investigation and the exercise of judgment and discretion, incidental to the administration of the law. Because it is of a judicial nature or the exercise of quasi judicial functions does not contravene the constitution. The determination of certain facts or things in the operation of the law is merely incidental to the administrative powers of the commission. The legislature could delegate power to determine the facts and things upon the decision of which the operation of the law is made to depend. This is not the exercise of judicial power by a commission in the sense that courts administer judicial remedies, but is incidental to the exercise of delegated administrative powers. The exercise of judgment and discretion as an incident to such power is not the exercise of judicial power within the meaning of the constitution. The authority delegated to the commission relates to the administration of the law, and not to the exercise of judicial remedies. The preliminary determination of facts required to be solved by investigation and the exercise of judgment and discretion are but incidental to the commission’s administrative duties.”³²

31. *People v. Colorado Title & Trust Co. (Colo.)*, 178 Pac. 6, 9.

32. *People v. Colorado Title & Trust Co. (Colo.)*, 178 Pac. 6, 10,

"The power to determine whether a particular grade crossing is so dangerous to life and property of the public as to require a separation may be conferred on an administrative body, and is not a delegation of legislative authority."³³

The general assembly may lawfully delegate to the Public Utilities Commission the right and duty to exercise or compel the exercise of the power of eminent domain to secure the public safety.³⁴

Public Service Commission.—Though as a general proposition the fixing of rates is wholly a legislative function which cannot be delegated, yet statutes delegating to an administrative commission power to fix rates for public service corporations have generally been held not to violate any principle of constitutional law.³⁵

The legislature has authority under the police power of the state to authorize the Public Service Commission to increase or decrease fares on steam and street railroads.³⁶

citing *Consumers' League v. C. & S. Ry. Co.*, 53 Colo. 54, 74, 125 Pac. 577, Ann. Cas. 1914A, 1158; *C. & S. Ry. Co. v. Railroad Commission*, 54 Colo. 64, 129 Pac. 506; *D. & S. P. Ry. Co. v. City of Englewood*, 62 Colo. 229, 161 Pac. 151; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *State ex rel. v. Mo. Pac. Ry. Co.*, 76 Kan. 467, 92 Pac. 606; *State ex rel. v. Kan. P. T. C. Co.*, 96 Kan. 298, 305-306, 150 Pac. 544; *State ex rel. v. Andrae et al.*, 216 Mo. 617, 629, 116 S. W. 561; *State ex rel. v. Chittenden*, 127 Wis. 468, 502, 107 N. W. 500; *State ex rel. v. Public Service Com.*, 94 Wash. 274, 279, 162 Pac. 523.

33. *Chicago, etc., Ry. Co. v. Lake Co. (Ill.)*, 122 N. E. 526, 529.

34. *Public Service Co. v. Recktenwald*, 290 Ill. 314, 125 N. E. 271, 8 A. L. R. 466, 469; *Chicago, etc., R. Co. v. Cavanagh*, 278 Ill. 609, 116 N. E. 128.

35. *Appeal of Union Stockyards Co. (Neb.)*, 170 N. W. 908, 909, citing *State Public Utilities Commission v. Chicago & W. T. Ry. Co.*, 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, p. 50, and notes; *Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, and notes, 14 Ann. Cas. 606, and notes following.

36. *City of St. Louis v. Public Service Commission (Mo.)*, 207 S. W. 799, 804, citing *State ex rel. v. Public Service Commission*, 204 S. W. 497; *City of Fulton v. Public Service Commission*, 204 S. W. 386; *State Public Utilities Commission v. Railroad*, 275 Ill. 555, 570, 114 N. E. 325, Ann. Cas. 1917C, 50; *Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210; *Atlantic Coast Railway Co. v. Commissioners (N. J.)*

An act delegating to a public service commission power to regulate the time for furnishing cars, and to provide a penalty in the nature of compensation for delay, is not unconstitutional as delegating legislative powers.³⁷

The legislature is not deprived of the power to confer upon a public service commission control of the schedules, routing, and style of cars of a street railway in a municipality by a constitutional provision that no law shall be passed granting the right to construct and operate any street railroad within any city without consent of the local authorities.³⁸

Securities Commission.—The Minnesota statute (Laws 1919, c. 86) does not confer upon the state securities commission judicial nor legislative powers, and is not unconstitutional upon that ground; and in conferring upon it administrative powers with authority to determine facts and exercise its judgment in carrying out the purposes of the statute it is not constitutionally objectionable.³⁹

Board of Tax Commissioners.—In a recent Rhode Island case it was held that a statute taxing the portion of a corporation's intangible property which is capital doing business within the state is not unconstitutional, as delegating the legislative power to tax to the board of tax commissioners.

The court said: "The valuation of this intangible property, and of the items involved in its computation, can be determined with as much accuracy as the valuation of tangible property. The board is authorized only to determine facts; that is, to value property. Valuation is the basis of all taxation, and the legislature must leave to some administrative board the power to determine valuation. For the purpose of carrying out the legislative will, the tax act created a board of tax commissioners, vested with only administrative powers."⁴⁰

104 Atl. 218; *Collingswood Sewerage Co. v. Collingswood* (N. J. Sup.), 102 Atl. 901; *Salt Lake v. Traction Co.* (Utah), 173 Pac. 556.

37. *State v. Public Service Commission* (Wash.), 162 Pac. 523.

38. *Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210, 8 A. L. R. 916.

39. *State v. State Securities Commission* (Minh.), 176 N. W. 759.

40. *Mexican Petroleum Corp. v. Bliss* (R. I.), 110 Atl. 867, 871.

Federal Trade Commission.—The Act of congress of Sept. 26, 1914, sec. 5 (Comp. St. sec. 8836e), giving the Federal Trade Commission power to stop unfair methods of competition in commerce and declaring the same unlawful, is not an unlawful delegation of legislative and judicial power; congress having by the act declared the public policy applicable to the situation.⁴¹

Live Stock Board or Commission.—A state live stock commission cannot be empowered by the legislature to create a penal offense.⁴²

But the legislature may confer authority on a state live stock sanitary board to make rules and regulations, the violations of which will support prosecutions when the statute denounces the act as a crime.⁴³

“But all such rules and regulations, in order to be effectual, must conform strictly to the statutes authorizing their enactment.”⁴⁴

The statute and not the administrative regulation defines the offenses and imposes the penalties under chapter 7345, Florida Acts of 1917. Such statute provides a sufficient primary standard for authorized administrative regulations; no arbitrary authority is conferred upon the live stock board; the validity and reasonableness of permissible administrative regulations are subject to judicial review; and the statute does not delegate legislative power in violation of the constitution.⁴⁵

Game Commission.—A Washington Statute providing that “upon written application by the full membership of any county game commission to the state game warden, permission may be granted by the state game warden to shorten, close or open the season on any of the upland game birds of the state, in their respective counties,” is not unconstitutional as delegating to the warden and the commission legislative powers.⁴⁶

41. *Sears, Roebuck & Co. v. Federal Trade Commission* (Cir. Ct. App.), 258 Fed. 307.

42. *Ex parte Leslie* (Tex. Cr. App.), 223 S. W. 227.

43. *Reims v. State* (Ala.), 82 So. 576, 577.

44. *Reims v. State* (Ala.), 82 So. 576, 577.

45. *Bailey v. Van Pelt* (Fla.), 82 So. 789.

46. *State v. Thompson* (Wash.), 191 Pac. 620.

Recognition Board.—The duties of the recognition board under the Wisconsin Soldiers' Bonus Act are purely ministerial, and cannot be regarded as a delegation of legislative power. The legislature has determined the rule of law respecting the duties of the board, and the determination of the facts is vested in the board.⁴⁷

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47. *State v. Johnson* (Wis.), 175 N. W. 589, 601.